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No. 87-271

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

HARBISON-WALKER REFRACTORIES
A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner

v.

EUGENE F. BRIECK,
Respondent

On Writ Of Certiorari To
The United States Court Of
Appeals For The Third Circuit

AMICUS CURIAE BRIEF OF PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION (PELA) IN SUPPORT OF RESPONDENT

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AMICUS CURIAE BRIEF OF PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

The Plaintiff Lawyers Employment Association (PELA) respectfully submits this brief Amicus Curiae in support of Respondent. The written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

Amicus Plaintiff Employment Lawyers Association (PELA) is a non-profit organization consisting of over 630 lawyers in 48 states who specialize in representing individual employees concerning employment and labor matters. Most of PELA members' clients are non union employees with claims of wrongful or discriminatory termination in violation of state or federal law. Many PELA members represent individuals with claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq.

PELA is deeply concerned that victims of age discrimination continue to receive the same benefits of the inference of discrimination established by a prima facie case as victims of race or sex discrimination under Title VII of the Civil Rights Act, 42 U.S.C. 2000 et seq. Thus, PELA urges affirmance of the Third Circuit decision that summary judgment is improper where an

inference of discrimination exists and the employer's explanation for its actions is subject to credibility determinations.

SUMMARY OF ARGUMENT

Plaintiff Brieck, a qualified older employee, was replaced by a substantially younger employee, Mr. Faust. Plaintiff established a prima facie case, entitling him to a presumption of discrimination. The Defendant's proffered explanation was suspect because the stated need for an employee with "versatility" was refuted by contradictory evidence.

The Third Circuit correctly held that evidence of "inconsistent" and "implausible" reasoning raises issues of fact and issues of credibility that cannot be resolved on summary judgment. The motive and intent of the various defense witnesses and the credibility of their testimony is critical. If the

employer's proffered defense is disbelieved, prima facie case evidence is sufficient to support a plaintiff's jury verdict.

Amicus supports the Third Circuit decision holding that victims of age discrimination can utilize the same rules of circumstantial proof established in the lead Title VII cases of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). As applied to ADEA cases, a McDonnell Douglas presumption of discrimination is established where an employee 40 or over is terminated and replaced by a younger person. Once the employer introduces evidence that the termination was not discriminatory, the presumption is rebutted. But, the inference of discrimination raised by the the prima facie elements remains. Also, where no credible legitimate reason exists for the

employer's actions, an inference of discrimination arises "indirectly" from the lack of legitimate explanation. Thus, the ADEA plaintiff may prevail by showing that the defendant's evidence is "unworthy of credence" and is a mere pretext for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Employers often believe it is "good business" to retain younger employees rather than older employees in reduction in force cases. Fears of high insurance costs, a belief that older workers are inflexible, and a desire for cheaper labor costs have stimulated management to "tighten the belt" by laying off older employees. Moreover, as employers become more sophisticated, discrimination is becoming increasingly hard to prove. Fortunately, the prima facie case standard enables a plaintiff to prevail in spite of these obstacles.

Defendant wants to make a new rule, making it far easier to enter a judgment for employers. Defendant wants to prevent a plaintiff, who asserts that the employer's alleged justification for termination is a sham, from attacking the credibility of defense witnesses. If Defendant prevails, employers who manufacture false reasons for firing older employees can escape the effect of the well settled law that an inference of discrimination is raised by proof of McDonnell-Douglas prima facie elements.

STATEMENT OF THE CASE

Plaintiff-Respondent Brieck was 55 years old. He was a well qualified senior installation specialist with seventeen years of service. Petitioner-Defendant Harbison-Walker Refractories, because of an alleged need to reduce its workforce, laid off Plaintiff Brieck and several others with similar jobs. Thereafter, Defendant recalled Mr. Faust, then age 39, but did not recall Mr. Brieck. Under these facts, Plaintiff established a prima facie case of age bias under McDonnell Douglas v. Green, 411 U.S. 792 (1973).

Defendant said it rejected Brieck because the younger Faust had more diverse skills and was more qualified to do non-installation work. Plaintiff argued that the Company's stated reasons for selection were false and "unworthy of credence." Plaintiff produced evidence showing Defendant's "versatility" explanation was indeed a sham. For example, after his recall, Faust spent 75% of his time doing installations. The remaining time was spent on other activities which Plaintiff could have performed.

The District Court held that the "wisdom" of the Company's alleged judgment as to which employee should be retained could not be challenged. The Third Circuit reversed, holding that evidence of Faust's post recall

assignments raised a "question of fact as to whether the employer really believed that Faust's "varied" experience made him more qualified than Brieck..." (emphasis added). Relying upon Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1983), the Third Circuit had previously held that an ADEA plaintiff could defeat a motion for summary judgment by showing that the employer's proffered reason for the Plaintiff's dismissal was not "worthy of credence." Chipollini v. Spencer Gifts, 814 F.2d 893, 900 (3d Cir. 1987) (en banc). The Court also ruled that "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge could support an inference that the employer did not act for non-discriminatory reasons, and must be considered in an ADEA action." Id. at 900 (emphasis in original).

Defendant seeks to strip ADEA plaintiffs of their major weapon in the legal war against age discrimination. For a quarter of a century, the courts have recognized the grave difficulties of proving discrimination. Now Defendant, in the guise of protecting "management rights," seeks to destroy the "prima facie plus pretext" inference of discrimination arising when a qualified and experienced older employee is fired and replaced by a far younger and less senior employee and the proffered reason for his termination is "unworthy of credence."

ARGUMENT

I. A PRIMA FACIE CASE RAISES AN INFERENCE OF DISCRIMINATION THAT REMAINS AS EVIDENCE TO BE CONSIDERED BY THE JURY

A) Establishment Of A Prima Facie Case

An ADEA plaintiff may establish age discrimination by a variety of methods. A prima facie[1] case may be established by

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[1] A "prima facie case" is variously defined in Black's Law Dictionary as:

Such as will suffice until

demonstrating that the plaintiff was: 1) a member of the protected class; 2) discharged; 3) qualified for the position; and 4) replaced by a younger person. McDonnell Douglas v. Green, 411 U.S. 792 (1973). Proof of these elements raises a presumption of discrimination.[2]

> contradicted and overcome by other evidence.
>
> A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded.
>
> A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side. In some cases the only question to be considered is whether there is a prima facie case or no. (citations omitted).

Id., 4th Ed. 1968 pp. 1353-1354

[2] There are other methods of establishing a prima facie case. Disparate treatment, statistics, and pattern and practice evidence are examples.

B. The Effect of the McDonnell Douglas Prima Facie Presumption of Age Discrimination

When a plaintiff establishes a prima facie case of age discrimination, at that point there is both a rebuttable presumption of discrimination and an inference of discriminatory treatment. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 874-875 (1984); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1983); Fed. R. Evid. 301; see Conf. Rept. Np. 93-1277 to accompany H.R. 5463, pp. 9-10 . This Court has explained the effect of establishing a McDonnell Douglas prima facie presumption as "simply proof of actions taken by the employer from which we inferred discriminatory animus that in the absence of any other explanation it is more likely than

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> There is no requirement of direct evidence of discriminatory intent. Indirect or circumstantial evidence will suffice. United States Postal Service v. Aikens, 460 U.S. at 714 n.3, Furnco Construction Corp. v. Waters, 438 U.S. 567, 579-580 (1978).

not that those actions were based on impermissible considerations." Furnco, 438 U.S. at 579-580.

Once the prima facie case is established, the burden of production of evidence then shifts to the defendant to show that its actions were not discriminatory. Aikens, 460 U.S. at 714-715. If the defendant employer meets that burden of production, the prima facie presumption is rebutted, but the inference of discrimination remains as evidence in the case. The trier of fact may still consider, in making its ultimate findings of fact, the evidence introduced by the plaintiff to establish the prima facie presumption of age discrimination. Burdine, 450 U.S. at 255 n.10.

C. Under Rule 301 of the Federal Rules of Evidence An Inference of Discrimination Remains Even After A Presumption Is Rebutted

Rule 301 of the Federal Rules of Evidence specifically provides that even where a presumption of discrimination is rebutted,

the inference created by meeting the requirements for establishing the presumption remains for the trier of fact to consider in making the ultimate determination of whether discrimination occurred. See Burdine, 450 U.S. at 255 n.10; Cooper, 467 U.S. at 875; Henry v. Lenox Industries, Inc., 768 F.2d 746, 750-751 (6th Cir. 1985); Fed. R. Evid. 301.

To interpret Burdine in the manner Defendant urges, that a McDonnell Douglas prima facie presumption of age discrimination, once rebutted, disappears from the case and does not remain as a permissible inference of discrimination, would be completely inconsistent with Rule 301 of the Federal Rules of Evidence. As stated by the House and Senate Conference Committee in the legislative history that accompanied Rule 301:

> The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a

presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption, but it does not shift to that party the burden of persuasion on the existence of the presumed fact.

Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may presume the existence of the presumed fact from proof of the basic fact. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic fact.

The Conference adopted the Senate amendment.

Conf. Rept. No. 93-1597 to accompany H.R. 5463

P.L. 93-595, pp. 5-6 .

Contrary to Rule 301 of the Federal Rules of Evidence and Burdine, supra, Defendant would have this court rule that the inference of discrimination created by proof of the McDonnell Douglas criteria disappears from the case whenever the employer produces any evidence in rebuttal. Defendant urges, therefore, that an ADEA plaintiff must then produce additional evidence of age bias in order to avoid summary judgment.

However, this Court recognized in Burdine that even where the defendant employer presents evidence tending to discredit plaintiff's prima facie evidence or offers evidence in support of its contention that the plaintiff's termination was not discriminatory, that does not necessarily require that the plaintiff produce additional evidence in support of his claims. "[T]here may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant's

witnesses, will suffice to discredit the defendant's explanation." Burdine, 450 U.S. at 255 n.10.

Defendant urges upon this Court a "bursting bubble" theory regarding the effect of the McDonnell Douglas presumption. Defendant's contention is flatly contradictory to Rule 301 of the Federal Rules of Evidence and applicable law. An inference of discrimination, created pursuant to the McDonnell Douglas criteria as applied in ADEA cases, suffices, in combination with the other facts in this case, to create a question of fact that makes erroneous summary judgment in Defendant's favor.

II. The Third Circuit Decision Is Consistent With Prior Decisions of This Court That An Inference of Discrimination May Arise Indirectly From Defendant's Pretextual Explanation For A Discriminatory Discharge

In Furnco Construction Corp. v. Waters, the Court held:

> ...we know from our experience that people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons have been eliminated...it is more likely than not that the employer based his decision on an impermissible consideration...

Id., 438 U.S. at 577. Thus an inference of discrimination may be drawn by the jury where the plaintiff shows that the defendant's reasons for its actions are totally arbitrary and without a legitimate basis.

In Texas Department of Community Affairs vs. Burdine, 450 U.S. 248 (1981) this Court also held that a successful Title VII plaintiff:

> must demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. (emphasis supplied)

Id. at 256. This Burdine "unworthy of credence" standard permits a plaintiff, who has shown only a prima facie case, to prevail, without any additional evidence, by showing the defendant's explanation is false and pretextual.

The Burdine rule has been routinely applied in age bias cases. As stated by the Seventh Circuit:

> [A]n employer who knowingly discriminates on the basis of age may leave no written records revealing the forbidden motive. When evidence is in existence, it is likely to be under the control of the employer, and the plaintiff may not succeed in turning it up. The indirect method compensates for these evidentiary difficulties by permitting the plaintiff to prove his case by eliminating all lawful motivations instead of proving directly an unlawful motivation. (emphasis supplied)

LaMontague v. American Convenience Products Inc., 750 F.2d 1405, 1410 (7th Cir. 1984).

> If the employer is trying to hide its real reason, that effort - coupled with the evidence making up the employee's prima facie case - may convince the trier of fact that the real reason needed to be hidden and therefore probably was discriminatory.

Pollard v. REA Magnet Wire Co., 824 F.2d 557, 559 (7th Cir.), cert. denied 108 S.Ct. 488 (1987).

Victims of age discrimination deserve the evidentiary effect of the inference of discrimination raised pursuant to the indirect, "unworthy of credence" standard. Older employees generally have more skills and ability than younger employees because of their experience. Seniority systems which favor older workers have been accepted by American business for the past half century as fair. Thus, the selection of a younger employee ordinarily suggests a presumption of bias that is even greater than selection of a man instead of a woman or a white instead of a black. Here, there was powerful evidence of a false explanation, which in conjunction with the McDonnell Douglas prima facie case elements, raises an inference of discrimination.

III. The Third Circuit Decision Is Consistent With The Decisions Of The Other Circuits That Have Permitted ADEA Plaintiffs To Survive Summary Judgment By Showing That The Employer's Stated Business Reason Is Unworthy of Credence

The majority of the Circuits follow the Burdine approach in ADEA cases, holding that where a plaintiff discredits the defense by showing that the explanation is "unworthy of credence," the prima facie case presents sufficient evidence to submit the case to the jury. Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir. 1987); Crimm v. Missouri Pacific Railway, 750 F.2d 703 (8th Cir. 1984); LaMontagne v. American Convenience Products, Inc., 750 F.2d 1405 (7th Cir. 1984); Krodel v. Young, 748 F.2d 701 (D.C. Cir. 1984); Geller v. Markham, 635 F.2d 1027 (2nd Cir. 1980); and Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980). As the Fifth Circuit stated in Thornbrough v. Columbus. & Greenville Railway, 760 F.2d 633 (5th 1985):

> Thus in our view, unlike Humpty-Dumpty, the employee's prima facie case can be put back together again, through

> proof that the employer's proffered reasons are pretextual. (emphasis supplied).

Id. at 640.

The Sixth Circuit has succintly summarized the rule as follows:

> In that simple single-motive case, proof that the articulated reason was false, and therefore not the true reason for the employment decision, requires entry of judgment for the plaintiff. Aikens, 460 U.S. at 718 (Blackmun, J., concurring)...it is the resulting absence of legitimate explanation for the suspect employment decision that warrants the finding of discrimination.

Sims v. Cleveland, 813 F.2d 790, 793 (6th Cir. 1987).

The Third Circuit relied heavily upon evidence of Defendant's conduct subsequent to Plaintiff's lay off as shedding light on the true motive for selecting the younger employee for retention. Evidence of "post-transaction" facts is admissible to show that a defendant's

contention is not credible and is maintained in bad faith. 31A C.J.S. 444. The hornbook rule is as follows:

> Evidence of the acts or conduct of a person subsequently to the time of a transaction in controversy which are indicative of his state of mind in the doing of an act or which are suggestive of the fact of one's connection with that transaction, and which afford reasonable inferences or throw any light upon the subject matter contested, or upon which any reasonable inference or presumption can be founded as to the truth or falsity of the issue or of a disputed fact, is generally admissible in the trial of a civil action.

29 Am Jur.2d 322.

In view of the conflicting evidence concerning Defendant's motive and the inference of discrimination that the jury may draw where the employer's explanation is not credible, summary judgment was clearly erroneous.

IV. The Third Circuit Decision Follows This Court's Admonition That Summary Judgment Should Be Used Sparingly Where Motive And Intent Are At Issue

The decision below is well-grounded upon the long-standing principle that questions of motive and intent are to be decided by the jury, not by the judge. As stated by this Court:

> Summary Judgment should be used sparingly where motive and intent play leading roles.

Potter v. C.B.S., 368 U.S. 464 (1962); Accord, Sartor v. Arkansas National Gas Corp., 321 U.S. 620 (1943). The trier of fact's "evaluation of credibility [is assisted] by observing demeanor of witnesses while they testify." Alvado v. General Motors Corp., 229 F.2d 408 (2d Cir. 1956). Summary judgment is improper "where motive and intent and subjective feelings and reactions were to be searched." Alabama Great Southern Railway Co. v. L & N Railway Co., 224 F.2d (5th Cir. 1955). As one commentator noted:

> The correct principle is that a court should be cautious in granting a motion for summary judgment where state of mind is involved or where the facts are peculiarly in the knowledge of the moving party.

3 Baron & Holtzoff, Federal Practice and Procedure, 1232.2, p.114 (1951).

Neither Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986), nor Anderson v. Liberty Lobby Inc., 106 S.Ct. 2505 (1968), alters the rule that issues of fact involving intent and motive are jury questions. Whether an employer's action was discriminatory or based upon its "good faith business judgment" is a question of intent and motive. There is no reason to carve out an exception in ADEA cases to the fundamental right to have issues of fact and credibility determined by the jury. There is no reason for employers to be treated more favorably than other litigants.

Defendant would reward the ingenuity of employers who manufacture reasons as a pretext to cover up discrimination. Defendant would

permit such employers to escape a trial even where they have disregarded seniority, ignored a qualified older employee, and manufactured an explanation which was suspect because of post-decision evidence.

This Court should reject the ridiculous contention that juries are not permitted to "second-guess" management decisions. Employer subjective decision making has traditionally been subject to close judicial scrutiny in discrimination cases. Rowe v. General Motors, 457 F.2d 345 (5th Cir. 1980); Misretta v. Sandia Corp., 13 FEP 1690 (D.N.M. 1977) aff'd 639 F.2d 588 (10th Cir. 1980); Carroll v. Sears Roebuck & Co., 708 F.2d 183 (5th Cir. 1983); Harris v. Birmingham Board of Education, 712 F.2d 1377 (11th Cir. 1983); Shlei & Grossman, Employment Discrimination Law, Chapter 6, p.30 (1st Edition, BNA); Stacey, Subjective Criteria In Employment Decisions Under Title VII, 10 Ga. L. Rev. 737 (1976). In this case, the employer had no

seniority system, formal evaluation system, or other objective review prior to selecting the employees to be retained, recalled, or discharged permanently. Here Defendant's defense relied entirely upon the credibility of its supervisory witnesses, Sekeras and Sheatsley. It was they who testified by affidavit and deposition that Faust's alleged diverse skills, rather than his age, was the reason for his retention. (Sekeras affidavit p. JA 15, Sheatsley deposition p. JA 105-06). But, Defendant would deny Plaintiff the opportunity to show that the supervisors were liars who fabricated the "versatility" defense to justify their age-biased decision to retain Faust, age 39, instead of Plaintiff, age 55.

The plain truth is that Plaintiff, age 55, had much more experience as an installation specialist than Faust, age 39. In addition, Faust's non-installation experience was non-technical work as an "office handyman." (Faust deposition 21-22).

But Defendant did not even consider recalling Plaintiff Brieck, age 55, rather than Faust, age 39. (Sheatsley depo. p.38) Finally, Defendant's failure to use the younger Faust for "diverse" duties after his recall is the strongest proof that Defendant's proffered reason for terminating Plaintiff Brieck and retaining Faust was nothing more than a "cover-up" for age discrimination.

Was it a coincidence that Defendant's decision makers selected the youngest of the four installation specialists? Or did they select the alleged versatility criteria in order to produce the desired result, retention of the youngest employee, Faust, age 39? These critical questions cannot be decided without considering the demeanor of the company witnesses and without full cross-examination.

V. National Policy Condemning Discrimination Favors Affirmance of the Third Circuit Decision

Discriminating employers have become more subtle over the years. "Smoking gun" direct evidence of discrimination is increasingly difficult to discover. Management has become sophisticated in its handling of terminations. "Documentation," consultation with counsel, and boiler plate explanations can be used to cover up a forbidden motive. Now, more than ever before, it is necessary to retain the inferences arising from the McDonnell Douglas prima facie case and the "prima facie plus pretext" standards. ADEA plaintiffs should be able to show, by cross examination and evidence of inconsistencies and implausibilities, that seemingly legitimate explanations are in fact a sham and cover up for age discrimination.

Individuals have tremendous obstacles in litigation. The employer controls all the evidence. Non-union employees have scant access to disparate treatment and statistical information. Employer discovery abuse, the high cost of litigation, and court imposed discovery limits often prevent employees from access to the truth.

Discrimination is a blight on the American scene. If Congressional objectives of a bias-free work place are to be achieved, the courts must continue to permit plaintiffs to prevail by the use of indirect and circumstantial evidence of discrimination, as set forth in Burdine.

CONCLUSION

Plaintiff's evidence raising inferences of discrimination and discrediting Defendant's alleged reasons for his dismissal was more than sufficient to create issues of fact entitling him to trial by jury and

precluding summary judgment. Thus, Amicus Curiae respectfully urges this Court to affirm the decision of the Third Circuit and permit the jury to determine the issues concerning the motive and intent of Defendant.

Respectfully submitted,

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